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No. 84-6

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAILOR J. KENNEDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an indictment charging petitioner with three counts of violating 18 U.S.C. 1014 was multiplicitous, where each count alleged a different false statement.

2. Whether the government withheld from petitioner materials that were producible under the Jencks Act, 18 U.S.C. 3500.

3. Whether the district court abused its discretion in limiting petitioner's cross-examination of a government witness.

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OPINIONS BELOW

The published opinion of the court of appeals (Pet. App. 1a-6a) is reported at 726 F.2d 546. The court of appeals also issued an unpublished opinion (Pet. App. 7a-10a).

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1984. A petition for rehearing was denied on June 12, 1984 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on June 15, 1984. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on three counts of making a false statement to a federally insured bank, in violation of 18 U.S.C. 1014. Petitioner was sentenced to two years' imprisonment on each of the three

counts, with the sentences on counts 2 and 3 to run concurrently with one another and consecutively to that on count 1. He also was fined $5000 each on counts 1 and 2.[1]

1. The evidence established that petitioner, a mortgage broker, sought a $350,000 line of credit from the First National Bank of Fairbanks. To secure the credit, petitioner offered to assign to the bank a note and mortgage that he purportedly held on an apartment complex in St. Mary's, Ohio. Petitioner represented that the owner and mortgagor of the apartment complex and the obligor on the note was the "Apartment World Corporation" (Tr. 197-203, 213, 215, 219-220). In light of these representations the bank approved the loan to petitioner, and on October 4, 1978, petitioner sent the bank a letter confirming the terms of the transaction (Tr. 224-225, 227-228). The bank thereafter advanced the line of credit (Pet. App. 2a).

On October 11, 1978, petitioner executed and returned to the bank an assignment of the mortgage, describing the mortgage as a "valid, subsisting first lien" on the apartment property (Tr. 228-229). On that same day petitioner assigned to the bank both the "Apartment World" note and a security agreement covering the amount represented by the note (Tr. 230-231). After receiving these documents the bank began disbursing funds from the line of credit (Pet. App. 3a).

On October 19, 1978, petitioner executed a collateral note of his own showing that he owed the bank $350,000, and reciting that the debt was secured by the "Apartment World" mortgage and note (Tr. 237). By executing the note petitioner continued the flow of payments from the line of credit (Pet. App. 3a).

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[1]The sentences on counts 2 and 3 were suspended in favor of five years' probation, provided petitioner complied with certain conditions imposed by the court (Pet. App. 14a-15a).

Some time afterwards the bank discovered that the "Apartment World Corporation" did not exist and that the mortgage and note offered as security by petitioner were fraudulent (Tr. 419-420 & Exh. 12). The St. Mary's apartment complex in fact was owned by petitioner's company and was heavily encumbered with several mortgages and liens held by other individuals and institutions (Tr. 250-251, 406-407).

2. Petitioner was charged with three counts of violating Section 1014. Count 1 identified as a false statement petitioner's October 4 letter (Pet. App. 16a-17a); count 2 listed as false statements the documents executed by petitioner on October 11 (Pet. App. 17a); and count 3 alleged as a false statement petitioner's October 19 declaration that the $350,000 line of credit was secured by the "Apartment World" mortgage and note (Pet. App. 17a-18a). Petitioner was convicted on all counts.

On appeal, petitioner contended, among other things, that the indictment was multiplicitous because all of the documents he had submitted to the bank contained an identical false statement and were designed to obtain one $350,000 line of credit. The court of appeals rejected this argument, however, explaining that "[t]he statute prohibits knowingly making any false *statement* to a bank. It is the false statement, not the anticipated loan, which defines the crime" (Pet. App. 5a (emphasis in original)). In reaching this conclusion, the court of appeals noted similar holdings by the Fifth and Eleventh Circuits. *United States* v. *Glanton*, 707 F.2d 1238 (11th Cir. 1983); *United States* v. *Miranne*, 688 F.2d 980 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983).[2]

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[2]In a separate unpublished opinion the court of appeals rejected several of petitioner's other contentions. In particular, the court concluded that the district court did not abuse its discretion in limiting petitioner's cross-examination of a prosecution witness because the

ARGUMENT

1. Petitioner's contention that the indictment was multiplicitous and violated the Double Jeopardy Clause (Pet. 8-21) is without merit. As this Court has indicated, such claims should be resolved by identifying the unit of prosecution created by the legislature. *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); *Bell* v. *United States*, 349 U.S. 81 (1955). In this case, as the court of appeals noted, Section 1014 itself defines the proper unit of prosecution as "any false statement or report" made to a federally insured bank. Here, petitioner made three false statements to such a bank at three different times — and each statement led the bank to take a different action.[3] Having each of the statements support a separate count of the indictment therefore satisfies the traditional "test to be applied to determine whether there are two offenses or only one": whether each count "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

The court of appeals' holding to this effect is consistent with the conclusions of the other courts that have addressed the scope of Section 1014. Thus in *United States* v. *Glanton, supra*, the Eleventh Circuit held that three counts had been properly charged under Section 1014 when the defendant had forged the same person's name on three different documents. Although each of these forgeries — on a bank signature card, on a check deposited in an account

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proferred cross-examination was misleading (Pet. App. 9a), and that petitioner's allegations of Jencks Act violations were untimely and in any event "lack[ed] merit" (*ibid.*).

[3]"Based on [the October 4] misrepresentation, the bank advanced the line of credit" (Pet. App. 2a); the documents sent to the bank by petitioner on October 11 "initiated disbursements of funds from the line of credit" (Pet. App. 3a); and the "collateral note [executed by petitioner on October 19] maintained the flow of payments from the line of credit" (Pet. App. 3a).

opened by the defendant, and on a counter check withdrawing funds from the account — were successive steps taken in furtherance of one fraud, the court explained that separate counts were permissible because "[e]ach count required the government to prove a different fact." 707 F.2d at 1240.[4] See also *Miranne*, 688 F.2d at 986 (where identical loan applications containing identical false statements were submitted in support of requests for 42 loans, an indictment charging 42 violations under Section 1014 was not multiplicitous because "the unit of prosecution is specifically defined" in Section 1014 as " 'any false statement or report' ").

Despite petitioner's assertion to the contrary, no conflict on this issue exists among the courts of appeals. The Section 1014 opinions cited by petitioner as dismissing multiple-count indictments did not address repeated, independent fraudulent statements, as does this case; to the contrary, they dealt with cases presenting several misrepresentations made on a single document, *United States* v. *Sue*, 586 F.2d 70, 71 (8th Cir. 1978); *United States* v. *Sahley*, 526 F.2d 913, 918 (5th Cir. 1976), or a set of misstatements so "interrelated" that "in the absence of any one of them, the 'false statement or report' was incomplete." *United States* v. *Canas*, 595 F.2d 73, 78 (1st Cir. 1979). The other Section 1014 cases mentioned in the petition simply are not on

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[4]Petitioner's suggestion (Pet. 21) that *Glanton* is inconsistent with *Williams* v. *United States*, 458 U.S. 279 (1982), is incorrect. *Williams* held only that a person who writes a check on his own account does not violate Section 1014 when the account contains insufficient funds to support the check, because such a check makes no "statement" concerning the drawer's bank balance. *Glanton*, in contrast, involved the forgery of another person's signature on a check.

point,[5] while the myriad remaining decisions cited by petitioner involve statutes other than Section 1014, and therefore shed no light on what Congress "desire[d] to make the unit of prosecution" under that provision. *Bell*, 349 U.S. at 83.

2. Petitioner's contention (Pet. 22-24) that the government violated the Jencks Act, 18 U.S.C. 3500, is equally flawed.[6] Petitioner maintains that he was not given notes of interviews of a key government witness conducted by an FBI agent and a prosecutor. In fact, however, the witness was not interviewed by the FBI (Tr. 243-244, 284-285), and there is no basis for petitioner's assertion that materials relating to such an interview exist. Similarly, while the prosecutor did speak to the witness, the prosecutor generated only "trial notes" for use during the proceedings (Tr. 244). Such notes, which are not "signed or otherwise adopted or approved" by the witness (18 U.S.C. 3500(e)(1)), plainly need not be produced under the Jencks Act. *Goldberg* v. *United States*, 425 U.S. 94, 105 (1976).

3. Finally, petitioner's factual contention (Pet. 24-26) that he was denied an opportunity to cross-examine a government witness effectively does not warrant review. The court of appeals noted in its unpublished opinion that petitioner was permitted to conduct a "vigorous and sustained" cross-examination of the witness and that petitioner's "proffered cross-examination did not directly relate to

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[5] *United States* v. *Pullen*, 721 F.2d 788 (11th Cir. 1983), does not address multiplicity at all. *United States* v. *Mangieri*, 694 F.2d 1270, 1282 (D.C. Cir. 1982), which rejected a defendant's claim of duplicity in the indictment, explicitly did not "foreclose the possibility that under some circumstances multiple misrepresentations might justify separate offenses."

[6] The court of appeals noted in its unpublished opinion that petitioner's Jencks Act claim was raised for the first time one week before oral argument, and therefore had not been brought to the court in a "timely fashion" (Pet. App. 9a).

[the witness's] credibility and could have misled and diverted the jury" (Pet. App. 9a). The district court's decision to limit cross-examination in these circumstances was well within its discretion. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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